



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 25, 1996

Mr. Philip S. Haag  
Hutcheson & Grundy, LLP  
111 Congress Avenue, Suite 2700  
Austin, Texas 78701-4043

OR96-0608

Dear Mr. Haag:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 39622.

The Lost Creek Municipal Utility District (the "district"), which you represent, received a request for any agreements and correspondence between the district and "FM Properties, Barton Creek Properties, Freeport-McMoRan, and any other organizations or individuals related to these businesses." You state that you have provided the requestor with a copy of an agreement between the district and FM Properties, but assert that two letters between attorneys for the district and attorneys for FM Properties are not responsive to this request, or that these letters are excepted from disclosure by sections 552.103 and 552.107 of the Government Code. You have submitted copies of the documents that are at issue to our office for review, and have also submitted affidavits from the general manager of the district and from an attorney for FM Properties.

Initially, you contend that the letters between attorneys for the district and attorneys for FM Properties are not responsive to the request because the letters are not from or to the district itself, but from or to *attorneys* representing the district. We reject this argument. An attorney representing a client is considered an agent of the client. *Dow Chemical Co. v. Benton*, 357 S.W.2d 565, 568 (Tex. 1962); Open Records Decision No. 499 (1988). Moreover, a governmental body must make a good faith attempt to match a request for information with information held by the governmental body. Open Records Decision No. 561 (1990) at 8. We believe the request for information clearly encompasses information to or from attorneys acting on behalf of the district.

You next argue that the requested correspondence is excepted from disclosure under section 552.103 of the Government Code. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or

a political subdivision is or may be a party. A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You argue that litigation is reasonably anticipated on several grounds. You state that the district and FM Properties have been negotiating issues relating to a Master Effluent Disposal Agreement between the parties. You have submitted affidavits from both parties stating that if an agreement is not reached, each of the parties have stated that they will pursue litigation. You also point out that the district recently submitted an application to the Texas Natural Resources Conservation Commission (the "TNRCC") to amend its waste discharge permit. Although the district subsequently withdrew the application, you argue that litigation (in the form of an administrative hearing) is anticipated before the TNRCC relating to permits of the district or FM Properties. This office has previously held that the hiring of an attorney and assertions of an intent to sue by a potential adverse party is sufficient to demonstrate that litigation is reasonably anticipated. Open Records Decision Nos. 555 (1990), 551 (1990). Additionally, in Open Records Decision No. 436 (1986) at 6, this office concluded that litigation is "anticipated" where a party demonstrated its intention to apply for a permit before an administrative board. Based on these previous attorney general opinions, we conclude that the district has established that litigation is reasonably anticipated. We also find that the requested information is related to the anticipated litigation.

Although the district has demonstrated the applicability of section 552.103, we nonetheless find that the district may not withhold the requested correspondence. Section 552.103 is intended to protect the discovery process and litigation interests of a governmental body. Open Records Decision No. 551 (1990) at 4. Absent special circumstances, once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). In the situation at hand, you have demonstrated that FM Properties is a potential adverse party in anticipated litigation.<sup>1</sup> Because FM Properties has previously had access to the letters that are the subject of this request, you may not withhold them under section 552.103.

In a letter dated March 29, 1996, you also assert that the requested information is excepted from disclosure under section 552.107 of the Governmental Code. A governmental body must state the exceptions to disclosure that it believes are applicable to

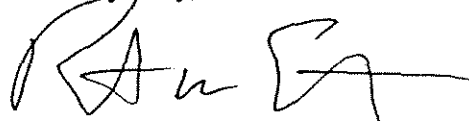
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<sup>1</sup> Although you state that "the district has been informed" that an "environmental group" and/or the City of Austin will request a hearing in response to any potential permit changes, you have not established that litigation is reasonably anticipated as to these entities. Section 552.103 requires more than mere conjecture that litigation may ensue. Open Records Decision Nos. 518 (1989), 328 (1982).

information that is the subject of a written request not later than the 10th calendar day after the date of receiving the request. Gov't Code § 552.301(a). Absent a showing of a compelling interest, a governmental body may not raise additional exceptions after the 10-day deadline. Open Records Decision No. 515 (1988); *see also* Gov't Code §552.302. You did not raise section 552.107 within the time required by section 552.301(a). Moreover, the letters that you seek to withhold are between attorneys for the district and a potential adverse party, and therefore cannot fall within the attorney-client privilege. Open Records Decision Nos. 574 (1990) at 5-6 (communications between attorney for governmental body and opposing counsel not excepted from disclosure under section 552.107), 200 (1978) at 2 (information disclosed to third parties not covered by attorney-client privilege). Thus, you may not withhold the requested information under section 552.107.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'RWS', followed by a long horizontal line extending to the right.

Robert W. Schmidt  
Assistant Attorney General  
Open Records Division

RWS/ch

Ref.: ID# 39622

Enclosures: Submitted documents

cc: Ms. Nancy Naeve  
1711 Lost Creek Blvd.  
Austin, Texas 78746  
(w/o enclosures)